

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16-CRB-0001-SR/PSSR (2018–
2022) (Remand)

DECLARATION OF DAVID DEL BECCARO
IN SUPPORT OF OPENING BRIEF ON REMAND

1. My name is David J. Del Beccaro and I am the Co-President and CEO of Music Choice. I submit this Declaration in support of Music Choice’s Opening Remand Brief in the SDARS III proceeding. I am fully familiar with the facts set forth in this Declaration, including based upon my review of Music Choice business records and discussions with other Music Choice employees, and if called upon to further testify could do so truthfully and competently.

2. As the founder of Music Choice, I have overseen all aspects of the company’s business since its inception. I helped commercialize Music Choice (at the time named Digital Cable Radio Associates) beginning in 1987, when I served as Vice President, Business Development for Jerrold Communications, a division of General Instrument Corporation. After approximately four years of product development and market testing within Jerrold, I helped secure financing for the digital music service concept through a partnership of major cable, technology, and music companies, beginning in 1991 when the company launched as a stand-alone entity.

3. Music Choice was the very first digital music service to launch anywhere in the world. Consequently, we had to create most of the technology we needed to transmit digital music channels to subscribers. I personally helped to invent some of that technology. In my capacity as President (now Co-President) and CEO of Music Choice over the past thirty years, I have devised, implemented, and overseen the many changes in the company's service offerings, features, and technologies, constantly improving the service and adapting to new distribution technologies, consumer preferences and market requirements.

Music Choice Began Transmitting its PSS to Subscribers Via the Internet in 1996 and Has Continued to Do So Ever Since

4. When the Music Choice service was first launched in the late 1980s, the music channels were initially made available to consumer cable television subscribers as well as business establishment cable subscribers. The cable industry typically refers to consumer subscribers as "residential" subscribers in order to differentiate them from business establishments that subscribe to cable television service, which are called "commercial" subscribers. This use of "residential" was never used to convey a limitation or other description of the service itself, but rather was used solely to differentiate the type of subscriber.

5. In the late 1980s and early 1990s, the term "cable" was used in a broad sense to cover not only service providers using actual coaxial cable to provide television service, but almost any type of television programming subscription services offered to consumers. This included, for example, telephone companies that had entered the television service market. Over time, as additional types of technologies were used to transmit television signals to consumers and other types of companies began offering those services, the industry moved away from the term "cable" provider and moved to the term Multichannel Video Programming Distributor – or

MVPD – in order to avoid confusion. But in those earlier days, “cable” was often used more broadly to mean what we now call MVPD.

6. Shortly after the Music Choice service was launched, it expanded from traditional cable systems into other types of MVPDs, such as telephone company systems and satellite television providers. We would soon expand further to wireless telephone company providers.

7. Starting in the early 1990s, Music Choice began working on ways to transmit its music channels over the internet. We first achieved this on a test basis in 1993 or 1994. These first experimental transmissions were similar to typical webcasting transmissions in that each transmission could reach only one device. Music Choice’s service worked on a multicast model, however, where one channel transmission is ultimately received by many subscribers at the same time. We spent significant time and resources working on developing a way to multicast using the internet. During this time, we added internet transmissions to our license requests pending with ASCAP and BMI. Attached hereto as **Exhibit MC 10** is a true and correct copy of Music Choice’s November 21, 1995 letter to BMI requesting an internet license. We were in various discussions with MVPDs about potential new internet features at that time, including Time Warner Cable.

8. We were ultimately able to develop technology that enabled Music Choice to be the first music service to multicast over the internet. As I have previously testified in this proceeding, we launched that feature as part of our consumer subscription service in 1996. At that time, MVPDs were beginning to offer and market what they called high speed internet service to their television subscribers, although it was not yet widespread. Music Choice’s internet transmissions were first offered as part of this type of high speed internet access

package. Because of this, we referred to the feature as a “cable modem” service in those early days.

9. This feature allowed consumers who received internet service from their MVPD to access the Music Choice music channels on any device connected to the internet – typically a computer at that time. The subscriber could log into a portal using either a web browser or in some cases a separate software application to authenticate themselves as a subscriber. After authentication, the subscriber could select from various Music Choice channels and listen to those channels while surfing the web or doing anything else on their connected device as long as the device remained connected to the internet. For some affiliates, the channels would be transmitted from a web portal on the MVPDs servers, and for others the channels would be transmitted directly from a web portal on Music Choice’s servers.

10. As with any new addition to our service offering, the internet feature was first launched with a few individual systems within a few of our MVPD affiliates. In 1996, MVPDs were just beginning to roll out high speed internet access via cable modems, but Music Choice made its service available to those subscribers from the very beginning. The first system to launch the internet-based access to Music Choice’s music channels was Continental Cablevision’s Jacksonville system. Continental began providing the Music Choice service via internet in September of 1996. Over the remainder of 1996 and 1997, various other MVPDs, including Time Warner Cable, Adelphia, Comcast, MediaOne, and Cox began providing Music Choice’s music channels via internet.

11. Each one of these MVPD affiliates had many cable systems across various geographic areas. As noted above, a new feature or product offering – especially one like the internet service that required investment in new technology and equipment – would launch in

one or two systems first and then – if the offering was successful – roll out to the other systems owned by the MVPD. The roll-out of Music Choice’s internet feature proceeded in the same manner. In each instance where it was introduced, the offering was successful and was soon expanded throughout all of each MVPD’s systems – typically as soon as each system had the technical ability to provide it to subscribers. By July of 1998, the internet access feature was widely available through the MVPDs named above and others, though not necessarily on every system owned by that MVPD.

12. Music Choice has very limited business records from twenty-five years ago. Consequently, I can no longer determine the exact launch dates for each individual MVPD or system within a particular MVPD, other than the September 1996 launch on Continental. However, I have reviewed various business documents that we still have from that time period and they all confirmed – and refreshed – my recollection of events and particularly that the music channels were being transmitted to subscribers via internet through multiple MVPDs as of July 31, 1998.

13. As a preliminary matter, Music Choice frequently includes a timeline of “Music Choice firsts” in its internal and marketing presentations. That timeline has always – and for many years prior to the topic becoming an issue in this proceeding – included a reference to Music Choice having the first music multicast over the internet in 1996. It is one of many points of pride for the company that we have been first to do so many things that later became industry standard practices. Attached hereto as **Exhibit MC 11** is a true and correct copy of an example of such a timeline included in a State of the Company presentation given to Music Choice employees in 2011.

14. As noted above, we still have a copy of our license request to BMI in 1995 for internet transmissions. As the Judges may be aware, when a company negotiates its first license with ASCAP or BMI, the applicable consent decrees provide that the company is fully licensed upon request. After the request is submitted, the licensee negotiates rates and terms with ASCAP and BMI and hopefully comes to an agreement. If no agreement is reached, the rates and terms are set in rate court proceedings similar in many ways to these proceedings before the Judges. In practice, these negotiations with ASCAP and BMI often take many years before final terms are settled and a final license agreement is signed. Although we no longer have a copy of our similar request to ASCAP, I am certain that we also requested an internet license from ASCAP – we have never sought a license from BMI without also seeking a license from ASCAP for the same service – and when our first final license was eventually executed with ASCAP it retroactively included internet.

15. In the file for a Music Choice partners' meeting held on October 11, 1996, page I-7 includes a discussion of our cable modem activities, including the September 1996 launch of the internet access feature on Continental's Jacksonville system, as well as the imminent launches in Time Warner's Akron system, Adelphia's Coudersport and Tom's River systems, Comcast's Bryn Mawr system, and Cox's Orange County, California system. Although there were sometimes delays in these roll-outs, there were no instances in which our cable modem feature started the testing process without rolling out within a year thereafter. Typically, the roll-out took far less than a year. The records for this meeting also reflect that Music Choice was actively expanding and promoting internet access for its channels at the time. Page I-8 contains a reference to the potential for rolling out internet access via Bell South's telephone-based MVPD.

PUBLIC VERSION

Attached hereto as **Exhibit MC 12** is a true and correct copy of the relevant pages of the October 11, 1996 board meeting file.

16. In the file for our partners' meeting on February 13, 1997, the board presentation contains numerous references to the continued expansion of our cable modem offering. On page II-6, the presentation references Music Choice's expectation of additional cable modem opportunities with [[REDACTED]]. On page II-8, the presentation notes that the company expected its cable modem offering to expand to every partner during 1997 and describes the success of the Continental Jacksonville launch, with Music Choice's music channels being the most used website among subscribers. Page II-9 notes high interest from [[REDACTED]] in carrying the cable modem offering. The partners' meeting minutes for the October 11, 1996 partners' meeting, included in the February 13, 1997 file at page A-2, indicate a discussion of additional opportunities from the increasing roll-out of cable modems in the MVPD industry. Attached hereto as **Exhibit MC 13** is a true and correct copy of the relevant pages of the February 13, 1997 partners' meeting file.

17. In the file for Music Choice's September 17, 1997 partners' meeting, the board presentation contains numerous references to Music Choice's continued development and promotion of its internet-based offering and related issues. On page I-2, the presentation references a discussion of various internet-based television services that were coming to market at that time, including WebTV, Worldgate, and Interactive Channel. These were early services that made the internet available on consumers' television screens. In May of 1998, Music Choice entered into a formal deal with Worldgate, to make Music Choice's music channels available via internet on the Worldgate service, which had already launched with its first subscribers in April of 1998. During my deposition, counsel for SoundExchange showed me a document that counsel

PUBLIC VERSION

represented had been printed out from the Wayback Machine, purportedly of a press release published on Music Choice's website back in 1998, and the text of that press release indicated that Music Choice would be working with Worldgate on the technology necessary to make the Worldgate service work. I cannot vouch for the provenance or accuracy of the document SoundExchange's counsel showed me, but the text in the press release is inaccurate. Worldgate was a local Pennsylvania company and I was very familiar with its management, having assisted the company founder with his original business plan. I had been discussing the service and negotiating Music Choice's carriage via Worldgate for some time and was very familiar with its technology. We had agreed that Music Choice would be carried on the service long before the formal deal was announced. Worldgate's technology was already in place when we did our formal deal, and it had already launched in at least one system. Page I-20 of the presentation notes that Music Choice's short term business plan included growth via wireless phone subscribers. Page II-9 notes that the final term sheet with Time Warner Cable for including the channels with its Road Runner high speed cable service was under negotiation. Attached hereto as **Exhibit MC 14** is a true and correct copy of the relevant pages of the September 17, 1997 meeting file.

18. The internet-based offering was a significant enough part of Music Choice's overall business plan that it was referenced in some of our affiliate agreements, even if the affiliate did not yet have a cable modem service offering at the time the deal was signed. The agreement we negotiated with [[REDACTED]] in 1997 is a good example. On page 3, the agreement contains a provision [[REDACTED]]

[[REDACTED]]

[[REDACTED]]

hereto as **Exhibit MC 15** is a true and correct copy of Music Choice's 1997 affiliate agreement with [REDACTED].

Music Choice Has Continued to Offer and Develop its Music Channels Via Internet, Just As It Has Done With Its Service On the Television

19. In the years subsequent to 1998, Music Choice has continued to develop and improve the user experience and delivery of its music channels offered as part of its unified consumer service, including internet-based access to those channels. As technology progressed with respect to cable, satellite and internet, Music Choice continued to innovate and adapt to those changes in order to improve its service. These improvements are necessary for a viable business. No technology-based company can stay in business if they do not improve and adapt as the technology changes. These improvements always build, in one way or another, on prior improvements and the investments in these improvements always build on prior investments. It is totally unrealistic and inaccurate to analyze business investments in isolation as though they are disconnected and unrelated to one another, except when a company enters a totally new line of business with no relationship to its prior lines. But that has never been the case with Music Choice's consumer music service.

20. With respect to the music channels on the television, the technology used to get our channels to the consumer's television has constantly changed. Over time, coaxial cable gave way to microwave and fiber optic cable. The technologies used in cable boxes has constantly changed and improved. When Music Choice first launched, cable boxes were all analog. It was only later that digital cable became possible. And in more recent times, MVPDs have moved away from satellite transmission to receive programming from the programming networks like

PUBLIC VERSION

Music Choice from whom they get their content and now use internet protocol to receive their programming and to transmit their channels to subscribers' television sets via a new generation of cable boxes. As of today, many subscribers receive their "cable" television service on their television screens via internet transmissions to such cable boxes.

21. Through all these changes, Music Choice has adapted and improved its service. When Music Choice's service first launched, there was no on-screen display when a channel was playing. Later the song information was displayed on the remote control for the tuner box. By 1994, we developed a basic on-screen display, consisting of a mostly blank screen with some changing graphical content to avoid screen burn in and text identifying the song and artist. By 2001, we launched a more robust on-screen display with high quality images highlighting the performing artists and providing artist-related facts and trivia to drive consumer engagement with the music and artists. We made numerous other improvements to the service, which I have described in detail in my prior testimony in this proceeding and several earlier proceedings before the Judges. Each improvement was incremental, and would never have been possible without building in one way or another on prior improvements and inventions.

22. The business model for our consumer service has also changed over time. Music Choice started out as a purely a la carte service. Subscribers had to have separate cable boxes dedicated solely to Music Choice, and paid a separate monthly fee for our service. As technology improved – including technology and software we created – we were able to have the service received through the same set top box used to receive the other television channels. When the a la carte model proved unviable, we transitioned to a bundled model where the Music Choice service is included at no extra charge as part of the basic television package, though I would note

that in 1998 we were still in the process of making that transition. Some subscribers were still a la carte at that time.

23. Music Choice has also continuously improved and adapted its internet-based features, as one would expect. As we made improvements to the television screen user interface, we also made improvements to the screen interfaces on the computer and other connected devices. Sometimes improvements were made first on the television screen and then moved to the connected device screens, and other times improvements were first made on connected device interfaces and then rolled out to the television screen. But Music Choice's overall goal has always been to have the user experience fundamentally the same irrespective of how the subscriber accessed the music channels because it is the same service.

24. We have tried different business models using internet transmissions. For example, in 1999 we launched an advertising-based non-subscription webcasting service. As a non-subscription service, this offering was not eligible for the PSS license so we initially filed to participate in the CARP proceeding commenced in 2000 to set rates for non-subscription webcasters. However, we quickly determined that the potential advertising revenue could never support the costs associated with webcasting at that time so we discontinued the service in 2001 and withdrew from the CARP. We also tried an a la carte subscription webcasting offering that we called Backstage Pass, which we launched in 2000, but that service also was not viable and was discontinued after a short time. After the failure of Backstage Pass, we continued to concentrate our internet efforts on the internet delivery of our primary consumer service as part of the bundled television service package. In this regard, our internet-based offerings have developed as an integrated part of our overall consumer subscription service.

25. As we continued to roll out and improve Music Choice's internet-based features, we would often market each new roll-out or improvement as a "launch" of a product offering. This is standard marketing practice in many industries, including the television programming industry. Fundamentally, however, these were part of the organic evolution of the same consumer subscription audio service offered in 1998, whether received via cable, satellite, or internet and whether received on the television, computer, or any other screen. On any of these devices, the music channels – the only part of Music Choice's overall consumer service covered by the PSS license – are fundamentally the same as they were on July 31, 1998. The channels continue to provide non-interactive broadcasts of music on a subscription basis to consumers (or "residential" subscribers as that term is used in the MVPD industry) as a television programming package and are transmitted using various forms of cable, satellite, and internet media. The music is programmed essentially the same way it was in 1998. Although Music Choice has added additional services that are bundled with its consumer subscription audio channel service, such as video on demand and other video-based programming, any such features have always been separately licensed directly from the record companies and other rights holders.

The Channels Received Via Internet on Phones, Tablets, and Computers Are the Same as the Channels Received on the Television

26. Given that the internet transmissions have since 1996 always been an integral part of our consumer subscription service, the music channels provided via internet have always been fundamentally the same as the channels provided on the television. At most times since 1996, the channels available via internet were either the exact same set of channels available to a subscriber on the television or a subset of those exact channels. A subscriber listening to a

particular Music Choice channel via the internet would hear the same music at the same time as a subscriber listening to the same channel on the television.

27. Over the history of the service, new features typically are driven by improvements in cable, satellite, and internet technology. But these technologies do not all improve at the same time, nor are they rolled out to subscribers all at once. Consequently, new features typically roll out in one transmission medium first. But these improvements always transfer to the other transmission media as soon as the technology is in place to support those improvements, because our consumer service is one unified service and we strive to provide fundamentally the same user experience to our subscribers, irrespective of which type of device they use to receive the service.

28. This same dynamic also applies to the channels offered. Even in the earliest days of the service, the channels available to a subscriber could be different depending on which MVPD was providing the service, driven largely by technological constraints. Older cable systems would typically provide fewer channels than newer systems. Nonetheless, all of our channels were made available to all affiliates, and our contracts provided that each affiliate could launch new or additional channels as soon as they had the technological capability and capacity. Sometimes that capacity was available first on the television, sometimes on the internet, but the affiliate's right to carry the additional channels was simultaneous.

29. Consistent with this dynamic, for short periods we had additional channels available via the internet that were not yet available on the television. In these instances, the only difference between the channels available on both platforms and those only available via the internet was the sub-genre of music programmed on the channel. The internet-only channel playlists were created by the same professional programmers creating the playlists for the dual-

media channels, using the same programming rules and practices. The only difference was the specific songs played due to the difference in sub-genre.

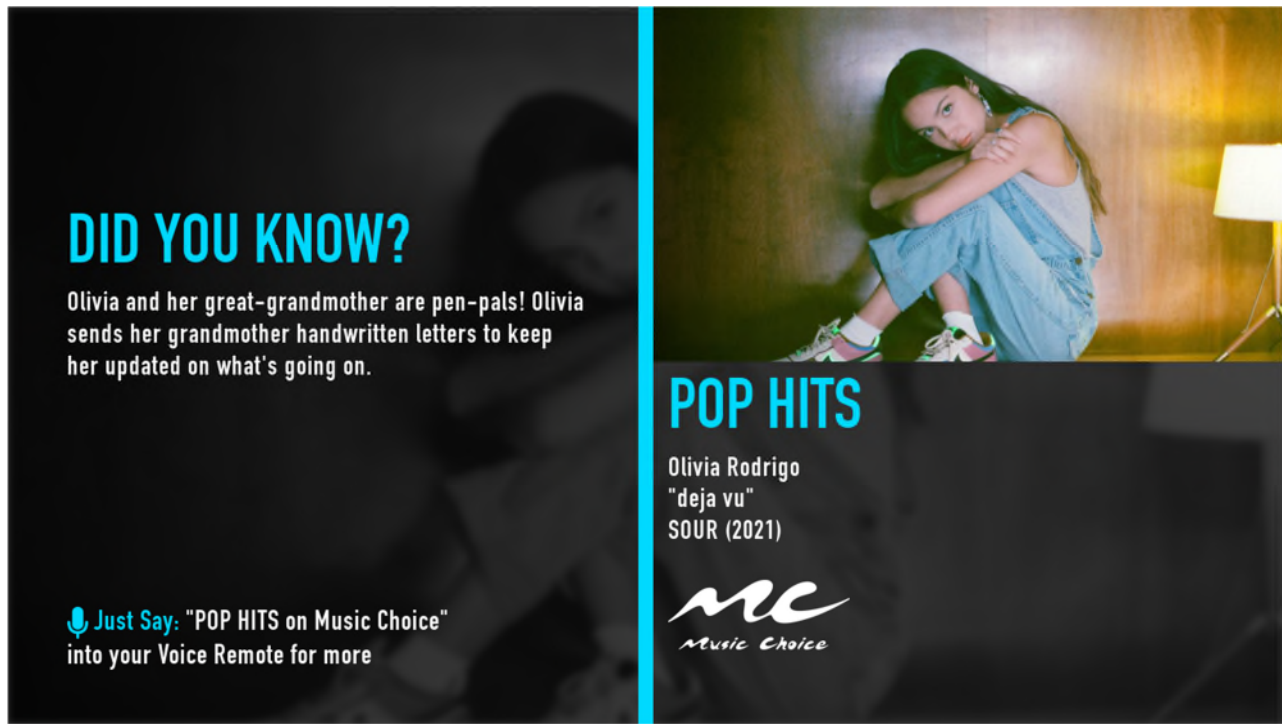
30. This was the case at the time Music Choice submitted its written testimony in this proceeding, and at the time of the hearing. But those additional channels were always expected to be made available on the television eventually. As explained in more detail below, within months of the hearing in this proceeding all of those channels were in fact also available on the television.

31. With respect to the on-screen interface, the user experience when accessing the channels via the internet has always been fundamentally the same as when listening on the television. In the earliest days, the Music Choice screen on any platform would only have basic text identifying the song, artist, and album. After we developed our more advanced on-screen display, the screen on any platform would have text identifying the name of the channel, the title, artist, and album for the song being played, some artist-related facts or trivia, and artist-related images. Naturally, the screen layout was slightly different to allow for the different shapes of the various device screens, but those differences were insubstantial and did not create a materially different user experience. For a time, the user interface via the internet included the ability to more easily switch to other Music Choice services such as our separately-licensed video on demand (VOD) service to watch videos related to the song being played on the audio channel. As with the additional channels, these features were not yet available on the television at the time of the hearing but were always intended to be implemented on the television as well.

32. Within months after the hearing in this proceeding – and well before the current rate period began – Music Choice rolled out its ETV features on the television screen for MVPDs and subscribers with the newest generation of cable boxes. By January 1, 2018, the ETV interface had rolled out on several of Music Choice’s MVPD affiliates, including several of our largest affiliates. As of that date, these affiliates included: Verizon, Altice, Frontier, Mediacom, Centurylink, RCN, Armstrong, Atlantic Broadband, Blue Ridge, Service Electric, GCI, and Grande Communications. We do not get specific reporting on exactly how many subscribers were receiving the ETV interface on January 1, 2018, but our best estimate is approximately [[REDACTED]] subscribers. As of today, we estimate that approximately [[REDACTED]] subscribers are receiving the ETV interface on their television sets. For any subscriber receiving our ETV service, every element of the Music Choice service is identical between receiving devices. Every channel available on our website or mobile apps is also available on the television screen, and the user interface is the same. The only minor difference would be to accommodate the different shape of a mobile phone screen.

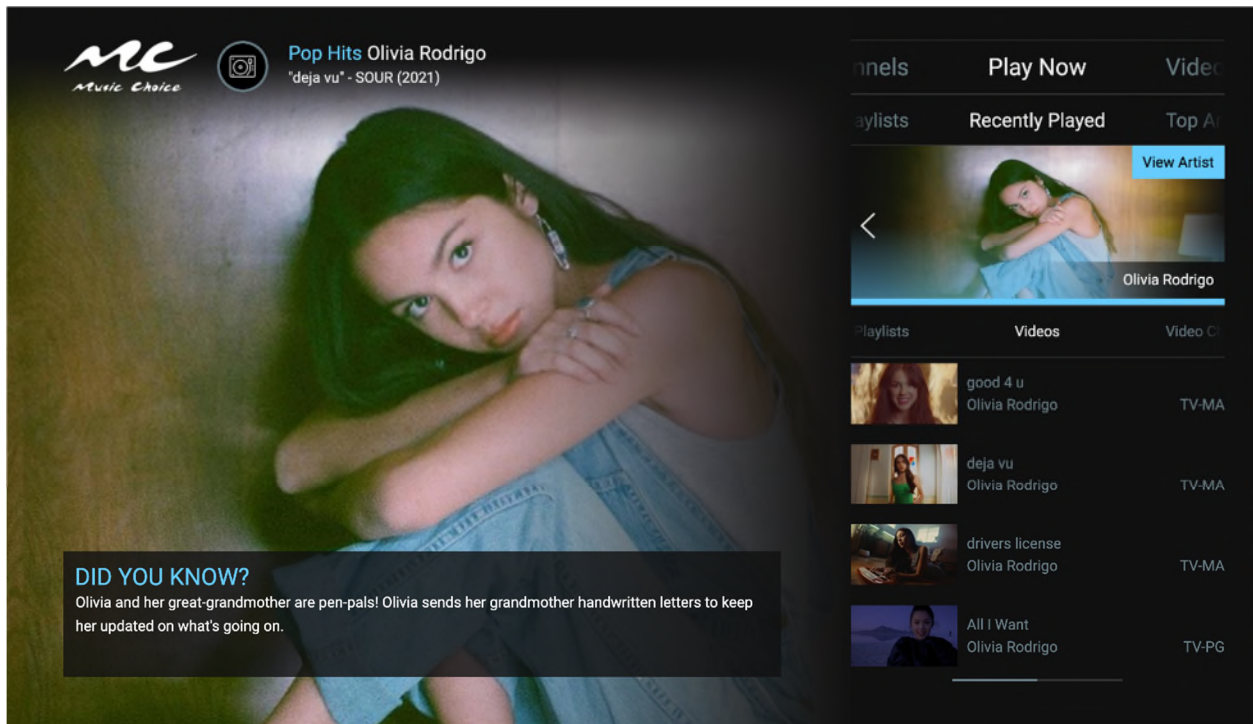
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33. This is what the Music Choice screen interface looks like today for those with older cable boxes who do not yet receive the ETV version:

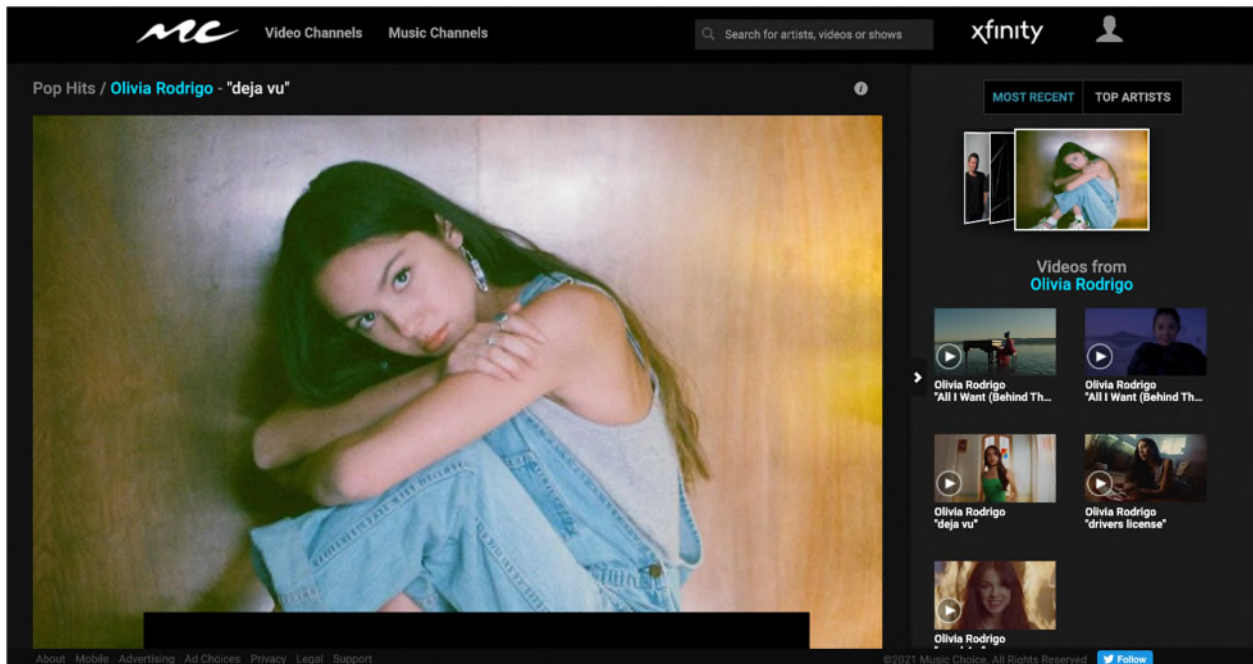


PUBLIC VERSION

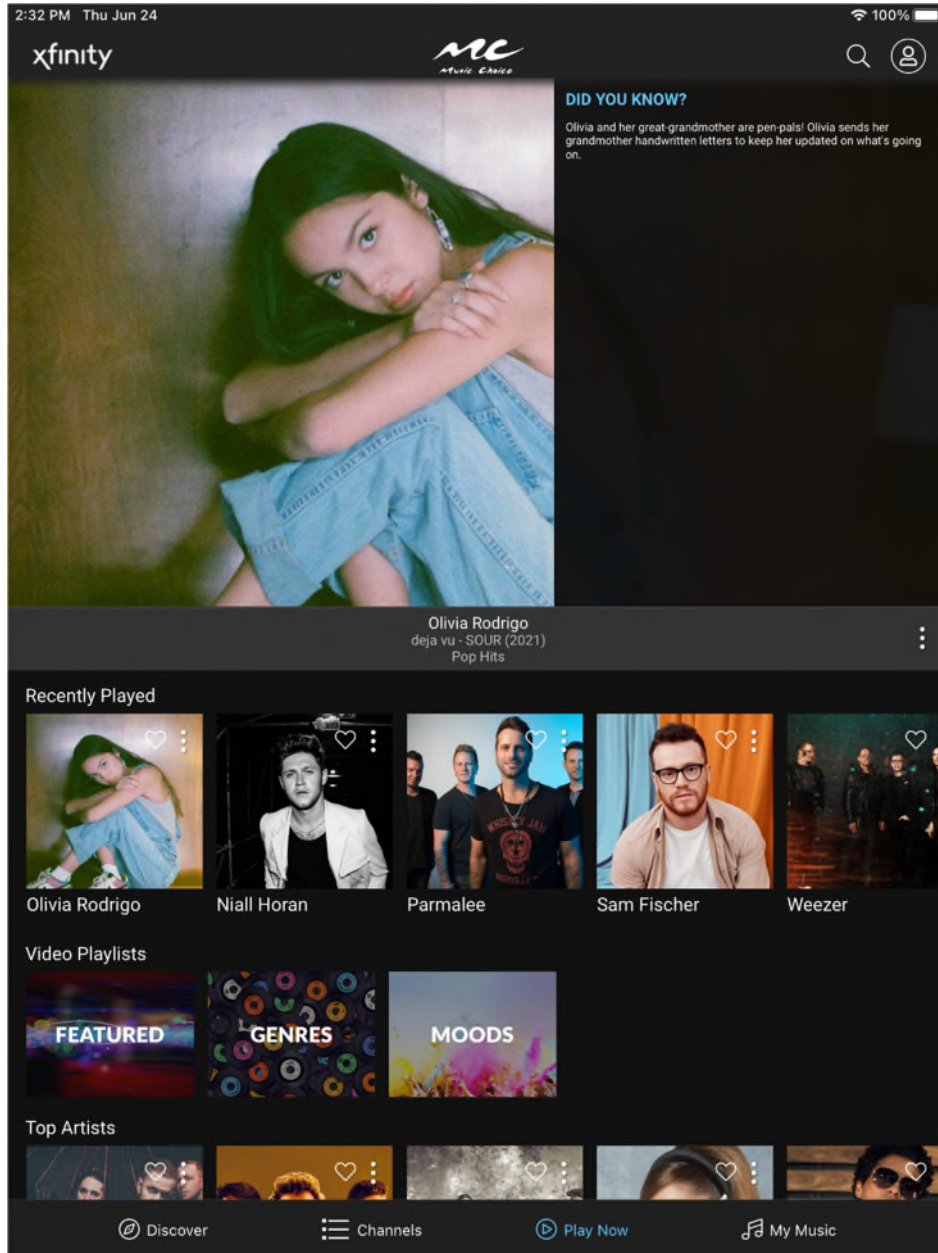
34. This is what our screen interface looks like on the television screen for a subscriber with an ETV-capable cable box:



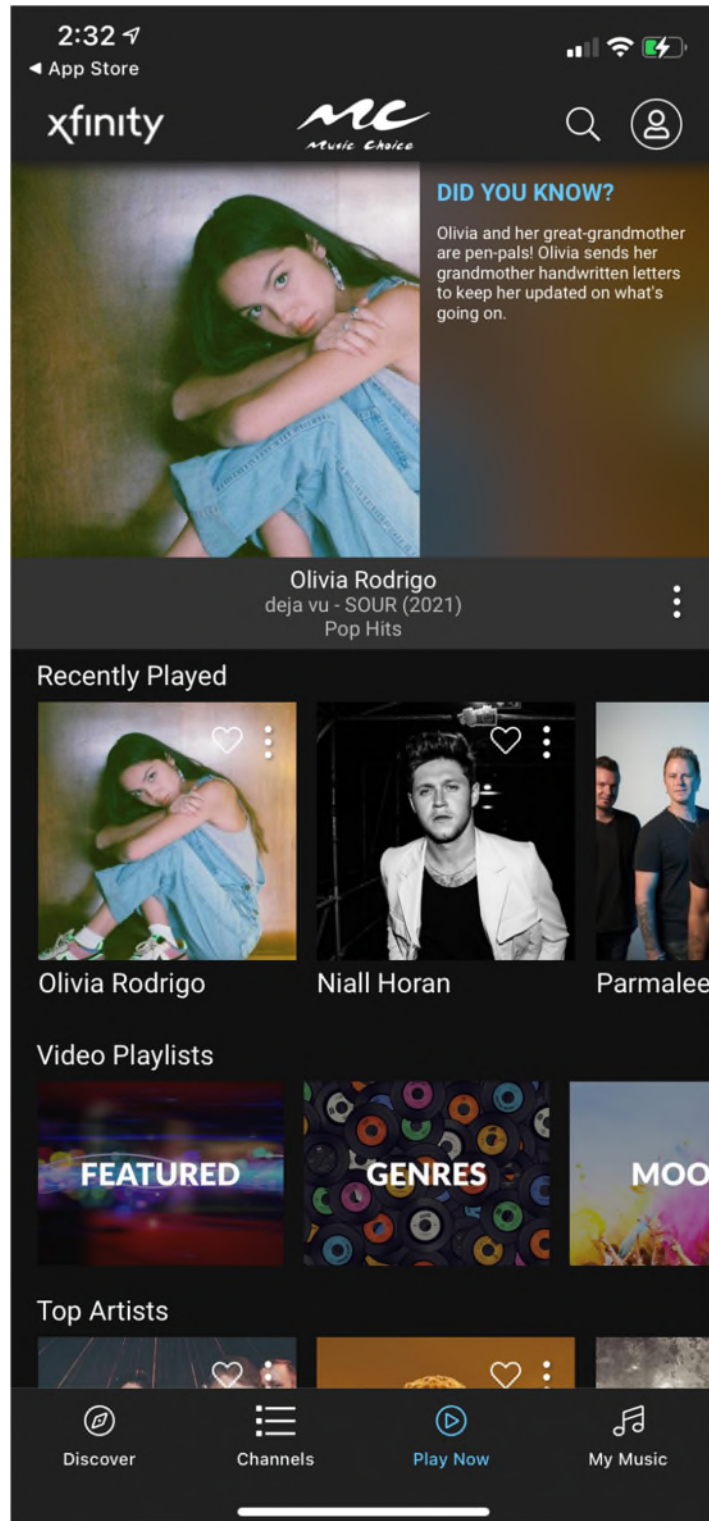
35. This is what our screen interface looks like on our website portal:



36. This is what our screen interface looks like on a mobile tablet:



37. This is what our screen interface looks like on a mobile phone:



38. Consistent with our approach of using the internet to provide additional access to our music channels as a bundled feature of our consumer television service, the user experience is currently identical for many subscribers, irrespective of which screen the subscriber uses to access our channels: television, computer (with the only distinction being that artist trivia facts have not yet been rolled out to the web player, but will be soon), tablet, or phone. Every single channel available on mobile devices is also available on the television screen. Even for those subscribers still temporarily using our legacy interface, the experience is almost identical with respect to listening to the music channels. The only difference is the number of channels available and the ease with which the subscriber can switch to other non-PSS features of our service, like music videos, which are separately licensed and approved by the record companies.

39. This slight difference between versions of the interface available to subscribers driven by the time it takes to fully roll out new technology by the MVPDs is nothing new. In 1998, for example, there were several different types of analog cable boxes deployed among subscribers for most MVPDs, and the first digital cable boxes were just being rolled out. So any given subscriber might have one of several types of set top box, and the features and channels available could be slightly different depending on the capabilities of that particular box. Different MVPDs and systems adopted new technology at different rates, and in some instances selected different channels to carry, which led to minor differences in the Music Choice service among different cable systems. Each subscriber was still getting the Music Choice service, irrespective of these technology-driven differences.

40. With respect to the number of channels offered, the number of channels available to a given subscriber has always changed over the course of the company's history. Even at a particular point in time, including July 31, 1998, the number of channels available varied among

different Music Choice MVPD affiliates and even among individual subscribers within an affiliate. Although Music Choice makes a certain number of channels available at any point in time, each affiliate decides how many and which of those channels to take. Then, in some instances subscribers with older set top boxes may get fewer channels than those with newer boxes. This is a common phenomenon with respect to television service provided by MVPDs and in this respect Music Choice is no different from any other network programming provider.

41. Music Choice's approach, dating back to 1996, of expanding "residential" subscriber access to additional devices via internet is consistent with the TV Everywhere model that has been widely adopted throughout the entire television industry for many years, as discussed further below.

Music Choice's Music Channels Were Available Outside the Home on July 31, 1998 and Have Continued to Be Available Outside the Home

42. As I noted above, the term "residential" has not been used by Music Choice or by the MVPD industry to describe a locational limitation on television service. Instead it is merely used to distinguish between consumer subscribers and businesses that subscribe to television service. MVPDs have always offered different types of subscriptions – at different fees – to those two types of subscribers.

43. From the time that Music Choice first launched its internet feature back in 1996, those internet transmissions have always been available to subscribers outside of their homes. The very first version of the internet access feature was marketed to the MVPDs' high speed internet customers and in 1996 was typically received on a computer because computers were the most common devices connected to the internet at that time. To access the service on a computer, the subscriber needed to use a web browser, which is merely a type of software application, or in

some instances a special purpose software application to allow the user to enter login credentials to verify that they were a subscriber. At that time, some affiliates had sections of their own websites for this purpose, and others had their subscribers log in through Music Choice's internet server. Once authenticated, the subscriber could select one of several Music Choice music channels and listen to music while they surfed the web or did anything else so long as the computer remained connected to the internet.

44. There was nothing about the implementation of this feature that necessarily limited access to within the subscriber's home. Internet access has always been available outside the home. Census data from 1998 showed that at that time, almost as many Americans accessed the internet from outside the home as those who did so from inside the home.

<https://www.ntia.doc.gov/legacy/ntiahome/fttn99/contents.html> , Part II.B.1 (17.0% used the internet from locations outside the home, while 22.2% used the internet from home). At that time, a significant number of consumers did not have computers or internet access at home, but did at work. Those consumers – if they were Music Choice subscribers – could listen to the channels at work, school, the public library, etc. using that internet connection. Moreover, MVPDs provided high speed internet service via cable modem to businesses and other non-residential subscribers.

45. Although some of the earliest implementations of this feature by some – but not all – of our affiliates were linked to cable modems, those cable modems were deployed at business locations in addition to consumers' homes so the service could be available to a consumer subscriber at their workplace or other commercial locations. Moreover, once MVPDs had gone through the effort to create web-based access for the cable modem subscribers they quickly realized it was beneficial to allow more broad access to the internet feature and allowed

high speed internet subscribers to access the feature from any internet-connected device with web browsing capabilities. They also quickly expanded access to all television subscribers who were getting the Music Choice service as part of their television subscription package, even if they received their internet service from a different ISP. By July 31, 1998, several of Music Choice's MVPD affiliates were allowing subscribers such access, irrespective of location.

46. Although most consumers accessed the internet using computers in 1998, there was nothing about the way these systems were set up that would limit access to computers. Any connected device could potentially access the Music Choice channels. I have no way of determining at this point whether any Music Choice subscribers did actually access the channels using any type of mobile device, but it was at least theoretically possible. As of July 31, 1998 mobile modems existed that could allow laptop computers to access the internet, and the very first mobile phones with the ability to access the internet were just hitting the market. Nokia, Ericsson, Motorola, and Unwired Planet had formed the Wireless Application Protocol (WAP) Forum in 1997 to jointly promote a common standard for wireless internet devices.

47. Mobile internet access via laptop computers, mobile phones, and personal digital assistants such as the Palm Pilot, certainly allowed for subscribers to access the Music Choice channels and became more prevalent in the next couple of years. Certainly smart phones and tablets as we know them today did not yet exist. That said, it was clear that these types of devices were coming and Music Choice was working on preparations – including the development of software applications – for making the service more specifically available on mobile devices via the internet as those devices became more prevalent.

48. By 2000, we had already launched the music channels on some of the very first wireless internet devices with providers such as Panja and Akoo.com. Music Choice developed

PUBLIC VERSION

downloadable or pre-installed software apps to allow these devices to access the Music Choice channels. By 2004, we launched our music channels directly to cell phone subscribers as part of Sprint's PCS Vision Multimedia Services channel lineup, alongside CNN, NBC, the Cartoon Network, and other television networks. This Sprint service also used downloaded or pre-installed software apps to interface with the Music Choice channels. RIAA and SoundExchange were well aware of the cell phone offering at the time. RIAA initially took the position that the Sprint service fell outside the scope of the PSS license and demanded that Music Choice pay different rates to SoundExchange, but backed off of that position and accepted our PSS royalty payments for that service without further objection after I explained the nature of the offering. DIRECTV also launched a mobile version of its satellite television service that could be received in cars, campers, and other vehicles via a small satellite antenna and the Music Choice channels were carried on that service as well.

49. I also note that none of Music Choice's other licenses needed for its consumer subscription service have ever limited the service to inside the home or otherwise differentiated between access within and outside the home. They have always allowed mobile access. For example, Music Choice's consumer audio service has always been licensed with PROs across all distribution mediums (cable, Internet etc.) and MC has never paid separate/additional fees or entered into separate licenses for internet performances from those PROs.

50. As with many other things, Music Choice was an early pioneer with respect to both internet access to television programming, and more specifically mobile internet access. The rest of the industry quickly caught up, however. For many years now, the MVPD industry has advanced a "TV Everywhere" model, whereby all television programming, not just the

Music Choice channels, are made available to subscribers on any internet-connected device – irrespective of location – as an adjunct to the service on the television screen.

51. Time Warner Cable was the first MVPD to formally propose the TV Everywhere model in 2009. That same year, Time Warner and Comcast began rolling out TV Everywhere service to their subscribers. The idea quickly spread to other MVPDs and has since been adopted by virtually every MVPD as a core part of their consumer cable and satellite television service offerings.

52. Although only selected content was initially available on a TV Everywhere basis in the early days, as each network's affiliate agreement came up for renewal the MVPDs required the addition of TV Everywhere service to allow cable and satellite subscribers to access the networks and channels on their computers and mobile devices, including while outside the home. Networks were made to include TV Everywhere rights without any separate or additional charge, precisely because it was viewed as the natural evolution of consumer – or “residential” as that term is used in the industry – pay television service. Within a few years, almost every network or other programming provider was including mobile access to their channels as part of the “residential” cable and satellite television subscription service.

53. Currently, and for a good many years, almost every MVPD has included almost every one of its carried networks and channels on a TV Everywhere basis, including streaming outside the home. In all instances, this access is provided as an integral part of the consumer's television service at no additional charge to the subscriber.

54. In the rare exceptions where a particular network is not available at a given moment in time, it is due to one of three reasons: (1) the network is so small or has such little viewership that the MVPD does not want to bother with the cost of provision; (2) the network's

affiliate agreement with the MVPD has not come up for renewal since TV Everywhere has become the industry standard, or (3) negotiations with a particular network have been so difficult for the MVPD that the MVPD chose to simply renew the prior affiliate agreement without any changes. Again, these instances are rare.

55. There are a few different ways that MVPDs make the network content available to subscribers, but in all cases subscribers must authenticate their cable or satellite television subscriptions through the MVPD to stream the programming. Streaming access may be offered via, inter alia, the MVPD's website, the network's website, the MVPD's app, or the network's app. Many networks now have several websites or apps, including websites or apps focused on different types of network content like news or sports, or individual shows like *Saturday Night Live*, as well as more general network-wide websites and apps.

56. Through these various websites and apps, the MVPDs and networks offer authenticated subscribers streaming access to both live television programming and on-demand content. Depending on the particular MVPD, live streaming (like the Music Choice transmissions at issue – Music Choice does not provide on-demand streaming of music audio content) may not be available outside the home through all of the different methods of access, but it is always available through at least one of these websites or apps. For example, if one particular MVPD's own app does not provide live streaming, it will be available via the MVPD's website, the network's website, or one or more of the network's apps. Most MVPDs, however, offer live streaming of most networks both through the MVPDs' and the networks' respective websites and/or apps.

57. It is beyond dispute as a factual matter that the cable and satellite television market has, for several years, treated streaming of television networks to subscribers via websites and mobile apps, both inside and outside the home, as an integral part of the residential cable and satellite television service provided to those subscribers. Such streaming is not differentiated as a separate service, nor do subscribers pay an extra or separate fee. In grandfathering the PSS, Congress intended to allow us to grow and change with the MVPD industry, as the Register recognized with respect to the technologies used to get the content to the subscribers' screens. That industry now treats TV Everywhere as a fundamental part of the residential television service offering, not as a separate service. Music Choice is paid one, undifferentiated fee for its audio channels, including on the television, and through the website and apps (whether inside or outside the home). Thus, the value of all of those transmissions is captured in the revenue upon which Music Choice pays its PSS license fees. Moreover, all of Music Choice's investments in developing and operating its website and apps would have been necessary even if the transmissions were limited to within the home. Thus, there are no separate investments or costs differentiating access outside the home from access inside the home.

58. To summarize, just as Music Choice has had to continuously improve and adapt its consumer audio channels as they are viewed on the television screen to new technology, consumer preferences, and industry requirements, so has it had to continuously improve and adapt those channels as they are viewed on other screens widely used to view television programming by subscribers. Whether accessed on the television screen, computer screen, tablet screen, or smart phone screen, the channels are part of the same service. Even the interfaces for the channels on the various screens has converged. And this is the product of the organic evolution of the same exact non-interactive, consumer audio subscription service offered by

Music Choice on July 31, 1998 in the same transmission media – cable, satellite, and internet – used by Music Choice on that date.

Music Choice’s Music Channels Have Always Been Accessed Using “Apps”

59. It has been suggested that perhaps the fact that Music Choice’s service in 1998 did not use “apps” – as that term is colloquially used today – might be sufficient to place Music Choice’s transmissions to those apps outside the scope of the PSS license. This suggestion is wrong, and based upon misunderstandings about software and the functioning of Music Choice’s service.

60. As a preliminary matter, an “app” is not a medium of transmission. With respect to Music Choice’s mobile apps the medium of transmission is the internet and as demonstrated above, Music Choice was unquestionably using the internet as a medium of transmission for its music channels on July 31, 1998.

61. The term “app” is merely a shortened version of the term “software application.” A software application is an executable computer program that performs a function. Nothing more and nothing less. With respect to Music Choice’s mobile apps, they do not create or propagate the transmissions; they are merely software applications that provide an interface for users to access and listen to the music channels.

62. From the very first day that Music Choice first transmitted its PSS in 1988, and even during prior testing, it has always had to create and use software applications to enable consumers to interface with and use the music channels. There has never been a way for subscribers to listen to the Music Choice channels without us creating an app for that purpose.

63. When we created our original, stand-alone cable box solely to receive the Music Choice service, we had to create an app to run on that box so that subscribers could receive and select the channels. When we moved to providing the service through the MVPDs' general purpose set top boxes, we had to create apps that could run on those boxes – which are a type of special purpose computer device just like tablets and smart phones are – to enable subscribers to interface with the service. When we first launched the cable modem and other internet-based access features for the service in 1996 consumers had to use apps to interface with the channels, whether the app was a web browser or a special purpose application installed on their computer to access the channels via web servers. One can see this reflected in our affiliate agreements. For example, on page 2 of our 1997 [[REDACTED]] attached as **Exhibit MC 15**, the agreement requires [[REDACTED]]
[REDACTED]
[REDACTED]]

64. As television technology changed and improved over the years, we have constantly updated and created new apps to adapt to those new technologies and to improve the subscriber interface. Each of these developments has built upon our prior investments and technologies. We could not have continued to have a viable service without being able to develop organically in this fashion, as Congress intended us to do when it created the PSS category in the DMCA.

PUBLIC VERSION

65. Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: June 29, 2021
Horsham, Pennsylvania

A handwritten signature in black ink, appearing to read "David Del Beccaro", written over a horizontal line.

David Del Beccaro

Exhibit MC 10

BMT file

Exhibit MC 10



Phone: 215-784-5840

Fax: 215-784-5869

November 21, 1995

Mr. Daniel P. Gold, Esquire
Broadcast Music, Inc.
320 West 57th Street
New York, NY 10019

Dear Dan:

As a follow-up to my previous phone call and pursuant to Article XIV (A) of BMI's Amended Consent Decree with the Justice Department, we are hereby applying for a right of public performance by means of the Internet.

Your prompt response would be greatly appreciated.

Best regards for the Thanksgiving holiday.

Regards,

A handwritten signature in black ink, appearing to read "W. Barry McCarthy, Jr.", written over the typed name.

W. Barry McCarthy, Jr.
Senior Vice President, CFO

Exhibit MC 11





Summary

We can do it! Remember, we are the company that:

- Launched the first digital broadcast service in the world in 1988
- Developed the consumer propositions that formed the basis for digital satellite radio in 1989
- Launched the first multicast service on the internet in 1996
- Launched the first streaming TV service on the internet in 1996
- Launched the first TV video interface for music channels in 2000
- Launched the first custom music channel service for TV in 2003
- Launched the first music VOD service for TV in 2004
- Launched the first music broadcast service for cell phones in 2004
- Launched the first interactive VOD service on TV including playlisting and custom video channels in 2006
- Launched the first dynamic advertising VOD capability on TV in 2006
- Launched the first automated, 24x7 interactive music video network, SWRV, on TV in 2010

48

Proof of Delivery

I hereby certify that on Thursday, July 01, 2021, I provided a true and correct copy of the Declaration of David Del Beccaro in Support of Opening Brief on Remand to the following:

American Federation of Musicians of the United States and Canada, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Universal Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

American Association of Independent Music ("A2IM"), represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Sirius XM, represented by Todd Larson, served via ESERVICE at todd.larson@weil.com

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Warner Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Sony Music Entertainment, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Recording Industry Association of America, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

SoundExchange, Inc., represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Signed: /s/ Paul Fakler